JUN 8 1957
JOHN T. FEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 990

SOL GERSHENHORN and D. H. CAPLOW,
Petitioners,

vs.

WALTER R. STUTZ ENTERPRISES, a limited partnership, WALTER R. STUTZ and LOUIS STUTZ,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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BRIEF FOR RESPONDENTS IN OPPOSITION.

STATEMENT.

The following additional Statement is believed necessary for an understanding of both Petitioners' Statement and this entire proceeding.

The action in the trial court was commenced by Respondents and involved a written lease of real prop-

erty by Respondents to Petitioners, which lease was attached to and made a part of the complaint (R.Vol. I, 8-35).[1]

Under the lease, Respondents were to construct and complete a building for Petitioners and, upon completion, rental was to commence (R.Vol.I, pps.21-22). Respondents began construction of the required building, but before it was completed, an amendment to the lease (R.Vol.I, 34-5) gave Petitioners the right to construct an additional and adjoining building.

The lease, as amended, contained normal provisions for concellation for breach and non-payment of rent (¶7; R.Vol.I, 26-27) and a special provision for termination in the event Petitioners failed to open for business within 6 months after completion of the building to be constructed by Respondents (¶3; R.Vol.I, 23-24).[2]

The trial court found that Respondents completed the required building on September 10, 1954 and that thereafter Petitioners accepted and occupied the premises (¶2, 3; R.Vol.II, 251); but Petitioners never

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[1]The Record on Appeal is referred to as R, followed by the Volume and page number.

[2]A word should here be said relative to Petitioners' contention (Petition, p. 9) that since the lease contained a provision (¶3; R. Vol.I, 23-24) requiring Respondents to reimburse Petitioners for certain improvements if Petitioners exercised their option to terminate for failure to open for business within six months of completion of the building, the court's failure to require such compensation was a violation of due process. The simple answer is that Petitioners were found to have defaulted in other matters, including failure to pay rent, the breach of which did not require such compensation (¶7; R.Vol.I, 26-27).

opened for business (¶6; R.Vol.II, 252) and have never paid any rent (¶3; R.Vol.II, 251).

The trial court gave judgment to Respondents for damages, restoring the premises to Respondents (R. Vol.II, 254-256), which judgment was affirmed by the appellate court, except as to one item of damages (Petition, Appendix B, pps.18-20). The trial court also, as an offset against the damages, ordered the cancellation of certain promissory notes given by Respondents to Petitioners for a loan made by Petitioners to assist Respondents in constructing the building (R.Vol.II, 253; lines 13-16).

Petitioners' Statement raises a question of the constitutionality of Rule XI of the Supreme Court of the State of Nevada and seems also to generally and vaguely complain with regard to some "forfeiture" (Petition, p.2). But whether Petitioners' complaint is directed to the cancellation of the notes, the restitution of the premises or the cancellation of the argeements is never made clear.

ARGUMENT.

RULE XI OF THE SUPREME COURT OF THE STATE OF NEVADA.

This rule, set forth in full in Appendix A of the Petition, contains two requirements:

(a) Oral argument on appeals is limited to one hour; and

(b) Errors assigned, but not briefed or orally argued, are waived.

Petitioners attack each provision as being in violation of the due process clause of Article XIV of the U. S. Constitution.

With regard to the one hour limitation for oral argument, Petitioners cite no authority for their position, whatsoever. Indeed, the authority is just to the contrary. As stated by this Court in the case of *McDonald v. Pless,* 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300, 1302,

> ". . . In the very nature of things the courts of each jurisdiction must each be in a position to adopt and enforce their own self-preserving rules (citing cases)."

Respondents submit that such a time limitation is the exercise of nothing more than this inherent power of any court to regulate the orderly disposition of its business. It would seem to be obvious that any court would necessarily have to make some reasonable limitation upon oral argument; and a limitation of one hour for such purpose is not only reasonable but necessary and proper.

Indeed, this Court, under its own rules, has applied the identical one hour limitation (Rule 44 [4]); and each of the U.S. Courts of Appeals have adopted a period of the same or lesser duration. For example, the Courts of Appeals for the First, Fourth and Eighth circuits have adopted the one hour limitation, those for the District of Columbia, Second, Third, Sixth, Seventh, Ninth and Tenth circuits have adopted a 45 minute limitation, and that for the Fifth Circuit has adopted a 30 minute limitation.

Respondents submit that, in view of the uniformly similar limitation imposed by all of the appellate courts of the United States, such a limitation by the Supreme Court of the State of Nevada is both reasonable and constitutional.

Passing to the second phase of the attack on Rule XI, that errors assigned, but not briefed or argued, are waived, we need only note that this is the universal rule, adopted in this and all other courts. As illustrative of this rule, it is noted that *Federal Digest, Vol. 5, Appeal & Error,* § 1078(1) lists some 70 federal cases, including *Eastman Kodak Co. of New York v. Southern Photo Materials,* 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684, and *Whiting v. Bank of U.S.,* 38 U.S. 6, 13 Pet. 6, 10 L.Ed. 33, under the heading:

> "Assignments of error, not briefed or argued, must be deemed abandoned and will not be considered."

It should also be noted that Petitioners never set forth the points which they believe were not considered by the appellate court. They note only that, in its decision, the court acknowledged that "Other questions 'lurk in the record' . . . *but which have not been properly presented for determination.*" But at no place in the Petition do Petitioners set forth what these questions were.

In considering Petitioners' contention, it is of importance that the rule provides that only errors which were *neither briefed or argued* are waived. Much of Petitioners' argument actually presents the contention that the mere lack of time in oral argument was

prejudicial, ignoring the fact that, previous to the argument, they had filed briefs, one of 11 pages and one of 36 pages. Thus, anything presented in either of these briefs *or* in the hour-long argument was clearly not waived under the rule. And since Petitioners specifically concede that "It must be assumed therefore, that, appellants did touch upon these errors in citing their points and authorities . . ." it is clear that the rule of which they complain was never applied against them.

The real answer to Petitioners' entire argument is that, although they repeated, time and time again, in their Petition and Motion for Rehearing, filed in the court below, and repeat in their Petition to this Court that their substantial rights were affected by the limitations imposed, *nowhere do they state what those rights were or what points they allegedly were prevented from presenting or from having considered by the court and which would have resulted in a different decision.* Candor compels the observation that, now having still another opportunity to bring such points to light, Petitioners should at least specifically refer to and identify these all important points and show how they would have necessitated a reversal of the trial court's judgment.

One further word should also be said with regard to Petitioners' allegation that they could "not conceive that the Court would compel the argument of two matters [the motion to dismiss and the case on the merits] within the space normally allotted for one."

In the first place, there existed no right or rule under which Petitioners had any time whatsoever to argue the motion to dismiss. (Indeed, in many courts, including the Courts of Appeals for the District of Columbia, the First, Sixth, Seventh and Eighth circuits, no time at all is allowed for oral argument of such motions). But Petitioners' contention that they could not conceive of the court requiring the argument of both matters in one hour is belied by the Reporter's Transcript of the oral argument in the appellate court where, after using some 55 minutes of his allotted time, Petitioners' counsel himself *anticipated that he had but one hour* by asking permission for further time. It does not seem consistent for him to have asked for further time 5 minutes before the period expired if he was not completely aware of the limitation.

In the last analysis, if Petitioners were prejudiced they were afforded an opportunity, in their Petition and Motion for a Rehearing, to set forth clearly and at any length they desired, the points which they allegedly had been prevented from submitting in their briefs and oral argument. Instead, as stated by the appellate court, a petition of 34 pages was "filed by the appellants which, upon patient reading, *is discovered to be in substance a reargument* of the appeal. For *this* reason, rehearing is denied." (Petition, Appendix B, 22).

We submit that not only did Petitioners fail to present the points which they allege to have been ignored, but such points do not, as shown by the record, exist.

AFFIRMATIVE REASONS FOR DENYING THE WRIT OF CERTIORARI.

As further, additional and affirmative grounds for opposing the grant of the writ, Respondents submit the following:

1. Petitioners are presently in contempt of the trial court for failure to comply with the judgment and orders of the trial court herein; and there exists an outstanding order of arrest of Petitioners for failure to comply with said judgment and orders.

2. The issues have become moot by virtue of the sale of the Petitioners' entire interest in the property in controversy by virtue of execution in an independent proceeding.

These matters are felt to require no great discussion or citation of authority.

The order of contempt of arrest of Petitioners is contained in the record (———) and shows that Petitioners have wholly ignored the judgment and orders of the trial court. They can hardly be said to be in a position to ask the aid of any court while remaining in contempt of valid and existing orders in the same action. Indeed, this Court has approved the dismissal of an appeal (a right given by statute) in a state court where appellants were in contempt of orders of the court. *National Union of Marine Cooks and Stewards v. Arnold,* 348 U.S. 37, 75 S.Ct. 92, 99 L.Ed. 46. The reasons therein set out for the dismissal of a statutory appeal more than support a refusal to grant certiorari, the granting of which is only discretionary.

As to the second affirmative matter, Respondents have attached hereto as an Appendix an exemplified copy of a Return of Sale of Real Estate made in an independent action,[3] showing that the interest of Petitioners, and each of them, in and to the real property, covered by the lease which is the subject matter of this action, has been sold under an execution sale by the sheriff. It is thus clear that since Petitioners no longer have any interest in or to said property, the entire matter has become moot. In such a case, as stated by this Court, in vacating the writ of certiorari in the case of *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America etc. v. Wisconsin Employment Relations Board et al.*, 340 U.S. 416, 71 S.Ct. 373, 95 L.Ed. 389, 391:

> "... There being no subject matter on which the judgment can operate, the cause is moot.
>
> "...'A federal court is without power to decide moot questions or to give advisory opinions which cannot effect the rights of the litigants in the case before it.'"

We thus submit that, entirely aside from the lack of merit of the Petition, the writ should not be granted because the case has become moot and because Petitioners are presently in contempt of the orders of the trial court.

---

[3] *Stine v. Woods et al.*, Case No. 70385, and *Bell et al. v. Cendali et al.*, Case No. 73347, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated, Las Vegas, Nevada,
June 5, 1957.

W. BRUCE BECKLEY,
WILLIAM R. MORSE,
Counsel for Respondents.

(Appendix Follows.)

Filed April 5, 4:43 P.M. '57. Helen Scott Reed, Clerk.

In the Eighth Judicial District Court
of the State of Nevada
in and for the County of Clark

Case No. 70385-73347 Dept. No. 3

William K. Stine, doing business as A-1 Plumbing Supply,
Plaintiff,

vs.

Lillian N. Woods, Harry Berner, Desert Spa Casino, Sol Gershenhorn, David H. Caplow, Fred Weichman, Charles Marems, Walter R. Stutz Enterprises, Paul McDonald, Jack Roson, Abe Toberoff, B. B. Lennon, Fred J. Trevilliam, Walter R. Stutz, Louis Stutz, Samuel N. Stutz, Amos Cindelli, also known as Amos Cendali, Paul T. Agsten, George B. Goldenberg, Nate Rosenberg, Bernice Gantert, Lillian Hiest and William J. O'Connor, and Hyman Freidnash,
Defendants.

Case No. 70385
Dept. No. 3

Consolidated With:

Harry W. Bell, H. M. Bell, and Anna Mackay, Executrix of the Estate of Sterling Mackay, Deceased,
Plaintiffs,

vs.

Amos Cendali and Walter Stutz,
Defendants.

Case No. 73347
Dept. No. 3

RETURN OF SALE OF REAL ESTATE

Office of the Sheriff of the County of Clark,
State of Nevada.—ss

I, W. E. Leypoldt, sheriff of the County of Clark, State of Nevada, do hereby certify:

That by virtue and in pursuance of the annexed execution (order of sale), I advertised the interest of David H. Caplow and Sol Gershenhorn, and each of them, in the property described in said execution, located in the County of Clark, State of Nevada, described as follows:

> The front portion of the property hereinafter described, being approximately 300 frontage on U.S. Highway 91 and running back from said Highway to a line 50 feet in front of and parallel with the existing motel building known as the Desert Spa Motel, of a portion of the South Half (S ½) of Section 9, Township 21 South, Range 61 East, M.D.B. & M., more particularly described as follows:
>
> COMMENCING at the intersection of the East line of U. S. Highway No. 91 as it now exist., with the North line of the South Half (S ½) of the Southeast Quarter (SE ¼) of the Southwest Quarter (SW ¼) of said Section 9; thence North 28°00′ East along the East line of said U. S. Highway 91, a distance of 300 feet to a point; thence South 89°25′ East a distance of 1000 feet to a point; thence South 28°00′ West a distance of 300 feet to a point on the North line of the South Half (S ½) of the Southwest Quarter (SW ¼) of the Southeast Quarter (SE ¼) of said Section 9; thence North 89°25′ West to the North-

east corner of the parcel of land conveyed by Val E. Sneed by Deed to Harry Mack and others recorded July 31, 1944, in Book 35, page 492 of Deeds; thence West along the North line of said parcel conveyed to Harry Mack and others to the East line of U. S. Highway 91 being the point of beginning,

to be sold by me at the Second Street Entrance to the Courthouse, City of Las Vegas, County of Clark, State of Nevada, on the 29th day of March, 1957, at 2:00 o'clock P.M.; that previous to said sale, I caused due and legal notice thereof to be posted in three public places in the township where said property is situated and where said property was sold for a period of twenty (20) days, successively, and to be published once a week for the same period in a newspaper, the Las Vegas Review Journal, a daily newspaper published in the City of Las Vegas, County of Clark, State of Nevada; and that on the 29th day of March, 1957, the day on which said property was so advertised to be sold, as aforesaid, I attended at the time and place fixed for said sale, and exposed the said property for sale in one parcel, at public auction, according to law, to the highest bidder for cash, lawful money of the United States, when Walter R. Stutz Enterprises, a limited co-partnership, being the highest bidder therefore, the said property was struck off by me to said Walter R. Stutz Enterprises for the sum of Fifty Thousand Dollars, lawful money of the United States, which was the whole price bid, and which I acknowledge to have received; and that I delivered to said purchaser a certificate of said

sale, and filed a duplicate thereof in the Office of the County Recorder of said County; and I have been unable, after due search and diligent inquiry, to find any other property of David H. Caplow and Sol Gershenhorn, or either of them, not exempt from execution, in said County, out of which to make the remainder of the judgment in said execution mentioned, or any part of said remainder; and I hereby return said execution satisfied only in part, namely in the sum of Fifty Thousand Dollars ($50,000.00).

After a diligent search and inquiry as required by law, I could find no personal property of David H. Caplow and Sol Gershenhorn, or either of them, whereby said execution could be satisfied in whole or in part.

March 29, 1957.

W. E. Leypoldt /s/
W. E. Leypoldt,
Sheriff of the County of
Clark, State of Nevada.

State of Nevada,
County of Clark.—ss

I, Helen Scott Reed, the duly elected, qualified and acting County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify and attest the foregoing to be a full, true and correct copy of the original:

Return of Sale of Real Estate, dated March 29, 1957, filed April 5, 1957, in the consolidated actions entitled, Stine v. Woods et al., Case No. 70385, Dept. No. 3, and Bell et al. v. Cendali et al., Case No. 73347, Dept. No. 3;

together with the endorsements thereon, now on file in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, this ____ day of June, 1957.

(Seal) Helen Scott Reed,
County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.

State of Nevada,
County of Clark.—ss

I, Ryland G. Taylor, Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, do hereby certify that Helen Scott Reed is County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record having a seal); that the signature to the foregoing certificate and attestation is the genuine signature of the said Helen Scott Reed, as such officer; that the seal annexed thereto is the seal of said District Court; that said Helen Scott Reed, as such clerk, is the proper officer to execute the said certificate of attestation, and that such attestation is in due form according to the laws of the State of Nevada.

In Witness Whereof, I have hereunto set my hand in my official character as such Judge, at the City of Las Vegas, County and State aforesaid, this —— day of June, 1957.

Ryland G. Taylor
Judge of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.

State of Nevada,
County of Clark.—ss

I, Helen Scott Reed, County Clerk of the County of Clark, State of Nevada, and ex-officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark (which Court is a Court of Record, having a seal, which is annexed hereto) do hereby certify that Ryland G. Taylor, whose name is subscribed to the foregoing certificate of due attestation was, at the time of signing the same, Judge of the District Court aforesaid, and was duly commissioned, qualified and authorized by law to execute said certificate. And I do further certify that the signature of the Judge above named to the said certificate of due attestation is genuine.

In Witness Whereof, I have hereunto set my hand and annexed the Seal of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark, this ____ day of June, 1957.

(Seal) Helen Scott Reed,
County Clerk of the County of Clark, State of Nevada, and Ex-Officio Clerk of the District Court of the Eighth Judicial District of the State of Nevada, in and for the County of Clark.